

MEMORANDUM OF UNDERSTANDING between
THE STATE OF MARYLAND and
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION III,
regarding SECTIONS 303(d) AND 303(e) OF THE CLEAN WATER ACT

WHEREAS Section 303(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d), and the implementing regulations of the United States Environmental Protection Agency ("EPA"), 40 CFR § 130.7(b)-(e), provide for: (1) the biennial submission to EPA of a list (the "303(d) list") which identifies water quality limited segments ("WQLSS") within a state's boundaries still requiring Total Maximum Daily Loads or Total Maximum Daily Thermal Loads (collectively, "TMDLs") for which applicable technology-based effluent limitations and other effluent limitations or controls required by federal, state or local law are not stringent enough to implement water quality standards ("WQSS"); (2) the establishment of a priority ranking for such waters; and (3) the establishment of TMDLs for those WQLSS at levels necessary to attain and maintain the applicable narrative and numerical water quality standards with seasonal variations and a margin of safety;

WHEREAS EPA and the State of Maryland ("Maryland") desire to restore the quality of impaired waters to achieve WQSS pursuant to Section 303(d) of the CWA;

WHEREAS Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and EPA's implementing regulations, 40 CFR § 130.5, provide for EPA's review of Maryland's continuing planning process ("CPP") from time to time;

WHEREAS the State of Maryland has primary responsibility for the identification and prioritization of WQLSs still requiring TMDLs and for establishment of TMDLs pursuant to Section 303(d) of the CWA and implementing regulations;

WHEREAS EPA intends to work with Maryland to assure that water quality-based NPDES permits issued by the Maryland Department of the Environment ("MDE") will include limits that are based on WQSS and consistent with the assumptions and requirements of any applicable waste load allocation in accordance with 40 CFR § 122.44(d)(1)(vii)(A) and (B);

NOW, THEREFORE, EPA AND THE STATE OF MARYLAND HAVE PREPARED THIS MEMORANDUM OF UNDERSTANDING ("MOU") AND EACH AGREE TO USE BEST EFFORTS TO ACCOMPLISH THE FOLLOWING:

This MOU is entered into by the Regional Administrator of Region III of EPA and, on behalf of the State of Maryland, the Secretary of MDE. The Maryland Department of Agriculture and the Maryland Department of Natural Resources are non-signing cooperating agencies.

This MOU sets forth a plan of action for EPA and Maryland to follow through the completion of all of the tasks set forth in Parts II and III herein, regarding the joint fulfillment of obligations set forth under Section 303(d) and (e) of the CWA.

This MOU shall serve as the framework for administering portions of Maryland's water programs. Specifically, it sets forth the respective duties of EPA and Maryland for (1) developing the lists of WQLSSs required by CWA Section 303(d), and (2) developing, where necessary, TMDLs for those waters identified on Maryland's 1996 Section 303(d) list approved December 31, 1996, and 1998 303(d) list approved September 28, 1998. It also describes the process by which Maryland will facilitate EPA's review of its CPP. EPA agrees to exercise best efforts to assist Maryland in obtaining additional federal funding for the purpose of carrying out its obligations under the MOU.

I. Section 303(d) List - Maryland will use best efforts to submit to EPA timely lists of WQLSSs requiring TMDLS in accordance with Section 303(d) of the CWA and 40 CFR § 130.7.

II. Establishment of TMDLS for all WQLSs on the 1996 and 1998
303(d) Lists

A. EPA and Maryland agree that the list of WQLSs (set forth in Exhibit A to this MOU) is Maryland's 1998 303(d) list of waters approved by EPA in the letter dated September 28, 1998, which consists of Maryland's 1996 303(d) list approved December 31, 1996, and 58 additional waters.

B. EPA and Maryland understand that TMDLS do not need to be established for any WQLS that are removed from the 1998 303(d) List of WQLSs contained in Exhibit A, and whose removal is approved by EPA. A WQLS may be removed from an approved 303(d) List for any of a number of reasons including but not limited to:

- (1) more recent or more accurate monitoring and assessment information and/or more sophisticated water quality modeling indicates that the WQLS attains WQSS;
- (2) new information indicates that, as a result of changes in conditions, including implementation of technology-based pollution controls, the WQLS is expected to attain applicable WQSS before April 1 of the next even-numbered year as the result of implementation of required pollution controls;

- (3) new information shows that, upon re-examination, the State determines that the original basis for listing the WQLS on the 303(d) list was inaccurate;
- (4) Maryland determines for other reasons consistent with the law and applicable regulations that the WQLS does not need a TMDL pursuant to Section 303(d) of the CWA and 40 CFR 130.7, as amended, and EPA approves Maryland's determination.

C. Subject to available resources, MDE will use best efforts to establish and submit to EPA, on or before December 31, 2008 and in accordance with the Watershed Cycling Strategy described in paragraph II.D. and the schedule attached hereto as Exhibit B, TMDLs for each of the WQLSs identified in Maryland's 1996 303(d) list that are not removed from the list pursuant to section 11.B, above. For the WQLSs added to Maryland's 303(d) list in 1998 and subsequent years, MDE will establish TMDLs within five years of listing for those segments having high priorities, and within ten years and in accordance with the Watershed Cycling Strategy described in paragraph II.D. for all other segments.

D. EPA understands that Maryland intends to develop TMDLs for the WQLSs remaining on the 1998 303(d) list and future 303(d) lists through a watershed approach, as provided in Exhibit C, Maryland Department of the Environment Plan for TMDL Watershed Cycling Strategy ("the Cycling Strategy").

- (1) Five large watersheds have been identified in the Cycling Strategy, each encompassing approximately 20% of the State. See Exhibit C.
- (2) The Cycling Strategy consists of three steps to be conducted in sequence for each watershed. The first step is monitoring. The second step is modeling and TMDL development. The third step, which is outside the scope of this Agreement, is TMDL implementation and watershed-based permitting, as appropriate. Maryland anticipates that each step will take approximately one year to complete in each watershed. Because the five-year cycle repeats itself, the watershed cycling strategy establishes a natural evaluation framework as the cycle is repeated.

- (3) Implementation of these three steps will be staggered through the five watersheds and resources for each step focused in one watershed each year. For example, monitoring will be performed for watershed #1 (the Coastal, Lower Eastern Shore, and Choptank watersheds) in 1998, for watershed #2 (the Upper Western Shore and Upper Eastern Shore watersheds) in 1999, for watershed #3 (the Patapsoco/Back and Lower Western Shore watersheds) in 2000, and so on. Modeling and TMDLS development will be performed for watershed #1 in 1999, for watershed #2 in 2000, for watershed #3 in 2001, and so on.

E. EPA will exercise best efforts to provide federal funding, training, and administrative and technical assistance to Maryland to facilitate its efforts to establish TMDLS for WQLSs in accordance with the Cycling Strategy and pursuant to this MOU.

F. At the request of EPA, Maryland will make available to EPA any existing and readily available water quality-related data which was or could be used to establish TMDLS for all WQLSs on the 1998 303(d) List and on any subsequent list.

G. EPA and Maryland agree to produce, on or before December 31, 1998, and on or before August 1 of each year after 1998 that this MOU is in effect, an annual workplan that (1) identifies the watersheds that will be the focus of monitoring and modeling/TMDL development during the following two federal fiscal years, and (2) identifies the TMDLs to be established by Maryland in the following federal fiscal year. This workplan will be included as part of the annual report described in Part IV of this MOU. In order to facilitate good communications between the parties, Maryland agrees to use best efforts to send EPA preliminary draft TMDLS well in advance of any deadlines; EPA agrees to use best efforts to review and provide timely comments on those preliminary draft TMDLS.

H. Where TMDLs have been established and approved, Maryland agrees to reissue existing NPDES permits and issue new NPDES permits as necessary to comply with the requirements set forth in 40 CFR § 122.44(d)(1)(vii)(A) and (B). Maryland anticipates that this will be accomplished on a watershed basis through the process established in the Cycling Strategy, as set forth in Exhibit C.

III. Continuing Planning Process

A. EPA acknowledges that it received Maryland's original CPP prior to November 28, 1975 and approved it. EPA further acknowledges that Maryland transmitted to EPA a "Continuing Planning Process for Water Quality Management" in 1976 and in 1986.

B. Maryland and EPA acknowledge that, the week of July 13, 1998, Maryland provided public notice of its intent to revise its CPP and invited public comment thereon. Maryland agrees to update its CPP and to transmit a document describing its revised CPP to EPA on or before October 1, 1999. EPA agrees to review and provide to Maryland comments on the revised CPP, in accordance with 40 CFR § 130.5, on or before August 15, 2000. Maryland agrees to consider EPA's comments and recommendations regarding the revised CPP.

IV. Monitoring and Assessment

Maryland will perform chemical and physical monitoring of its waters in accordance with the Cycling Strategy. With respect to biological monitoring, Maryland agrees to perform the tasks set forth in Exhibit D in accordance with the schedule provided in Exhibit D. Once a protocol for application of biological data

is established pursuant to the schedule set forth in Exhibit D, Maryland will conduct biological monitoring in accordance with the Cycling Strategy. In addition, the Maryland Department of Natural Resources will continue its existing monitoring program.

Maryland will utilize all existing and readily available biological monitoring data, in addition to physical and chemical monitoring data, for the purpose of determining WQLSs for the 2000 303(d) list and all 303(d) lists thereafter.

V. Funding

A. The Parties anticipate that in order for Maryland to perform its obligations according to this MOU, it will require additional funding.

B. EPA agrees to use best efforts to assist Maryland in obtaining additional federal funds to help provide adequate resources for establishing TMDLs according to the Cycling Strategy and related work plans to be developed under the MOU.

C. EPA further agrees to be flexible to the extent permitted by the applicable law and the terms of existing grant agreements in its oversight of Maryland's grant-related activities in order to accommodate reasonable and necessary

changes in Maryland work priorities and other tasks set forth in this MOU.

D. EPA recognizes that Maryland may not be able to establish TMDLS within the timeframes specified in the Cycling Strategy and work plans provided for under this MOU due to the inability of Maryland to obtain additional funding, a change in priorities resulting from a subsequently approved 303(d) list, or other unforeseen circumstances that are beyond the control of Maryland. If for any of these reasons, Maryland is unable to establish TMDLS in accordance with the Cycling Strategy and related work plans, then MDE and EPA will attempt to reach agreement on a reasonable extension of time in which Maryland may establish the TMDL. If upon diligent efforts, MDE and EPA are unable to agree on such an extension, MDE understands that EPA, in the exercise of its discretion, may exercise its has authority to establish those TMDLS pursuant to Section 303(d) of the CWA.

VI. Reports

On or before August 1 of each year that this MOU is in effect beginning August 1, 1999, Maryland will provide an annual status report to EPA describing progress toward completion of the obligations identified in this MOU including but not limited to

(1) the Cycling Strategy and workplan described in Part II Section G, above; (2) current and projected funding available to Maryland to carry out the obligations identified herein; and (3) other related issues or problems that prevent or delay accomplishment of the requirements of this MOU.

VII. Legal Effect

A. This MOU creates no cause of action against EPA or the State of Maryland beyond those, if any, that may already exist under State or federal law. In addition, the execution and implementation of this MOU does not constitute an explicit or implicit agreement by the Parties to subject themselves to the jurisdiction of any State or federal court. Nor shall this MOU be construed as an admission by the Parties that they have failed to implement the requirements of Section 303(d) or (e) of the CWA. Nor shall this MOU be construed as creating any right or benefit substantive or procedural, enforceable in law or equity, by any person or entity against any of the Parties. This MOU shall not be construed to create any right to judicial review involving the compliance or non-compliance with this MOU, nor does it constitute a determination on the part of EPA that any particular TMDL is required;

B. Nothing in this MOU shall be construed to require actions by the Parties that are inconsistent with or contrary to local, State or federal laws or regulations or any court order.

VIII. Termination

This MOU shall terminate upon the establishment of TMDLs for all WQLSS on the 1998 Section 303 (d) List for which TMDLs are required and the submission of a revised CPP, which Maryland anticipates will be completed by October 1, 2008.

IX. Modification

A. The Parties recognize that any efforts made by Maryland to implement this MOU are contingent on the availability of funds and other resources.

B. If circumstances change for such issues including but not limited to resource requirements or underlying legal requirements, the Parties may negotiate appropriate modifications


Memorandum of Understanding between MDE and EPA Region III
regarding Sections 303(d) and 303(e) of the Clean Water Act

to this MOU. Any modifications signed by the EPA Region III
Regional Administrator and the Secretary of MDE constitute
modifications of this MOU.

DATED this _____ day of _____, 1998

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: _____


W. Michael McCabe
Regional Administrator
USEPA Region III

STATE OF MARYLAND

By: _____

Jane T. Nishida
Secretary
Maryland Department of the Environment

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